# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 807

SOL FEINBERG, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 234–236) is not yet reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1941 (R. 237). The petition for a writ of certiorari was filed December 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiracy to violate the narcotic laws, the trial court erred in admitting evidence as to transactions in which petitioner did not actually participate.

2. Whether the trial court committed reversible error in its instruction concerning character evidence, to which instruction petitioner made no objection and suggested no amplification.

## STATEMENT

Petitioner was convicted (R. 207) in the District Court of the United States for the Northern District of Illinois on counts 17 (R. 16–17) and 32 (R. 29–33) of a 32-count indictment (R. 2–33).[1] Count 17 charged a violation of the Narcotic Drugs Import and Export Act (21 U. S. C. 174).[2] Count

[1] Petitioner was indicted along with 15 other defendants, Emma Ludwig, Stanley Moy, Manual Menendaz, Mamie Doe, Chester Doe, James T. Lewis, Lucille Williams, Austin Edge, Henry Driscoll, Harry Decker, James Tillman, Eddie Doe, Art Schultz, John Bridges, and Foster Mosley (R. 2–15). As to all defendants, counts 1 to 15, inclusive, count 21, and counts 27 to 31, inclusive, were withdrawn from the jury at the end of the evidence (R. 182). As to the petitioner, the court permitted the case to go to the jury only as to counts 17 and 32 (R. 182, 152–153).

[2] This section provides: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction,

32 charged a conspiracy to violate the Act (18 U. S. C. 88). Petitioner was sentenced generally to imprisonment for two years and to pay a fine of $250 (R. 209).

The Government's case may be summarized as follows:

On March 8, 1941, Dorothy Sullivan, a former narcotic addict (R. 73), told Manuel Menendaz (Mendez), whom she had known for several months, that she was "looking around for a connection" (R. 38). Menendaz took her to the home of Vic Shaw (Emma Ludwig), an addict and peddler, and there introduced her and vouched for her (R. 75–76). Dorothy said she wanted to buy an ounce of heroin (R. 75) and Vic made a telephone call (R. 76). Dorothy heard her ask for petitioner, who was known as "Sol," and then for "Stanley," and then say that "she wanted an ounce of the same thing that she had been getting, heroin" (R. 38–39, 75–76). An ounce of drugs was brought to Vic's house by Stanley Moy, and Vic paid him $60 for it, $35 thereof having been contributed by Dorothy. The girls divided "the stuff," Vic adulterating her share for resale

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be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(R. 39, 77). Dorothy later turned her share over to Federal Narcotics Agent Walsh (R. 40).[3]

On March 11, 1941, Dorothy went to Vic's and told Vic she wanted to buy some more narcotics (R. 78). Vic again called petitioner and told him she was sending Dorothy to him and that "she was all right, that he should deal with" her (R. 41, 78–79). Dorothy then went to petitioner's tavern, identified herself as the girl Vic had just called about, and gave petitioner $65 for an ounce of heroin. Petitioner told her it would be delivered to Vic's within thirty minutes, and Dorothy returned to Vic's. The heroin did not arrive promptly, and Vic called petitioner who told her "the delay was caused because the boys were trying to shake a tail; they thought they were being followed by government agents or the police and were trying to duck them." Menendaz came in, told Dorothy that petitioner was charging her too much, and went to see him. He returned and said petitioner told him that since Dorothy wanted the stuff she "would pay the price" (R. 42–43). Later, Art (Art Schultz) and another arrived with the heroin for Dorothy (R. 80). Early the next morning Art called Dorothy by telephone to see how she liked "the stuff." She told him it was very poor, but he said he "couldn't do anything

[3] Except where otherwise indicated herein, she turned the drugs over to Walsh shortly after making each purchase (R. 43–44, 46, 50, 52, 54, 56, 59, 61, 63, 67, 68).

about it" because she had already paid petitioner and she would have to see him about it (R. 43, 80).

On March 16, 1941, Vic informed Dorothy that petitioner "had some new stuff" he wanted Dorothy to try. On March 17, Dorothy went to petitioner's tavern and paid him $65 for an ounce of heroin and one Eddie delivered it to her at Vic's place. Dorothy and Vic tried it hypodermically and found it was of poor quality. Vic then called petitioner and he told her to have Dorothy return it and he would make it good (R. 44, 81). Dorothy returned it to the petitioner, keeping out a few grains which she turned over to Agent Walsh, but petitioner never replaced it, nor would he return her money (R. 44–45, 82).

Telling Vic she was dissatisfied with the price of the heroin she was getting, Dorothy then asked her to call "another connection" (R. 45). In response to Vic's telephone call, Austin Edge came to Vic's house and sold Dorothy an $8 deck (one-eighth of an ounce) of heroin that he was carrying in his hat band (R. 45–46). On March 19, Vic again telephoned to Edge for Dorothy. Edge came to the house with Lucille Williams and Lucille handed Dorothy one-eighth of an ounce of heroin for which she paid Lucille $8 (R. 47, 83). On March 20, 1941, while on her way to Vic's house, Dorothy met Edge on the street, told him she would rather deal directly with him than through Vic, and he told her that he and Lucille could always be

reached at room 414 at the Prairie Hotel (R. 48–49). Dorothy went on to Vic's, having previously told Vic she was coming to get some drugs. After she arrived, Vic called Edge and he delivered one-eighth of an ounce of heroin for which Dorothy paid him $8 (R. 49–50). On March 21, 1941, Dorothy went to room 414 at the Prairie Hotel and there found Edge, Lucille, Helen Kelly and one "Bubbles." Dorothy told Edge she wanted "to make a buy" and he left the room, returning shortly with a package of heroin for which she paid him $8 (R. 51). On March 22, Dorothy went again to Edge's room at the hotel, and paid him $5 for an introduction "to his connection" (R. 52–53). Edge then went out and returned with Henry Driscoll, who sold Dorothy an ounce of heroin for $55 (R. 53–54).

On March 22, 1941, Menendaz introduced Dorothy to Harry Decker "who was pushing stuff, meaning narcotics," and she purchased from Decker a $3 deck of heroin (R. 55–56).

On March 26, 1941, Dorothy purchased a $6 deck from Edge at his hotel room. Two colored women came in while she was there, purchased a $3 deck, prepared it, and took it. Lucille Williams and Helen Kelly also took doses (R. 57–58). Again, on March 27, Dorothy purchased an $8 deck from Lucille at Edge's room (R. 59).

On April 2 Dorothy went to Edge's room and there met Lucille and Mose (Foster Mosley). Lu-

cille was going to the hospital to see Edge, who was sick at the time, and Mose sold Dorothy $16 worth of heroin (R. 60–61). Dorothy left the hotel and met Harry Decker. He had nothing to sell her, so he made a telephone call, and in about fifteen minutes one Booker (John Bridges) arrived and sold her a $3 deck of drugs to try. Booker said he knew she was one of Edge's "good customers" and did not like to take a customer from a friend, but that nevertheless he would like to have her for a customer and that she could contact him through Decker (R. 62–63).

On April 3, 1941, at Lucille's request, Dorothy stayed in Edge's room at the hotel to tell "customers that might come in" to wait for Lucille, who had gone out to look for her "connection," Mose. Lou Cheatam and her son, and Maisie Hudson, and Bubbles Haines came in and waited for Lucille, who returned in about an hour with an ounce of drugs (R. 63, 64). Lucille sold a $16 deck to Lou Cheatam and her son and a $3 deck to Bubbles and some to Maisie Hudson. Lucille then said "she certainly appreciated it, because she would have lost thirty dollars' worth of business if [Dorothy] had not stayed there for her" (R. 65).

On April 8, 1941, when Driscoll, who was to bring some drugs, did not show up by midnight, Lucille took Dorothy out to the Squires or Squares tavern and there, in the early morning of April 9, found another "connection" of hers, Wing or

Wingey (James Tillman). Lucille bought a $6 deck and Dorothy a $3.50 deck from Wingey (R. 65–66). The girls returned to the Prairie Hotel, where they found Edge, who had obtained some drugs, and Dorothy bought an $8 deck (R. 67–68).

The substance purchased by Dorothy on March 8 was found to be a mixture of morphine and codein sulphate, derivatives of opium; all the other purchases were found to be heroin hydrochloride, also a derivative of opium (R. 137).

During the period covered by count 32, there were also numerous other sales. Mose sold heroin to Eddie (R. 105), to Earl Nettles (R. 109–110), to Wingey (R. 111), and to Glen Howard (R. 122). Wingey sold heroin to Earl Nettles (R. 109–110). Austin Edge and Lucille Williams sold heroin to Ruford Kelley (R. 114).

## ARGUMENT

1. Petitioner contends (Pet. 11, 15–18) that the trial court erred in admitting evidence as to the transactions in which he did not actually participate because such evidence proved a number of different and disconnected minor conspiracies and not the general conspiracy charged in the indictment.

The evidence set forth above (pp. 4–5), showing that petitioner himself sold narcotics to Dorothy Sullivan on March 11, 1941, was plainly sufficient to sustain his conviction on count 17,

the substantive count.[4] Since the general sentence imposed did not exceed that which might have been imposed on that count alone,[5] the validity of the sentence under the conspiracy count is immaterial. *Evans* v. *United States,* 153 U. S. 584, 595; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claasen* v. *United States,* 142 U. S. 140, 146–147; *Pierce* v. *United States,* 252 U. S. 239, 252–253.

Moreover, that the evidence complained of was admissible under count 32 of the indictment is clear. In that count each of the various transactions was alleged (R. 30–33) as a separate overt act in furtherance of a single comprehensive scheme to violate the narcotic laws. Consequently, there can be no question but that the evidence of these transactions was properly admitted to prove the allegations of the indictment. And that the proof adequately established a single over-all conspiracy in which petitioner participated is equally clear.

Menendaz and Vic Shaw were the initial conspirators who connived in arranging that Doro-

[4] Petitioner's contention (Pet. 18–19) that the testimony of the principal Government witness is incredible because she was an informer and a former narcotic addict, with a prison record, presents no question for review by this Court. The testimony was relevant and competent, and the weight to be accorded it was for the jury.

[5] 21 U. S. C. 174 (*supra*, pp. 2–3) provides for a fine of not more than $5,000 and imprisonment for not more than 10 years.

thy Sullivan be supplied with narcotics, and petitioner was the first to assist them in furthering their unlawful purpose, "knowing in a general way their purpose to break the law." *Luteran* v. *United States*, 93 F. (2d) 395, 399 (C. C. A. 8), certiorari denied, 303 U. S. 644. By thus embarking upon the criminal venture he became responsible for all which had been done or which might be done by his fellow conspirators in furtherance of the conspiracy. *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, 267 U. S. 597, 598, and 268 U. S. 689; *Rudner* v. *United States*, 281 Fed. 516, 519–520 (C. C. A. 6), certiorari denied, 260 U. S. 734. In furtherance of the same general conspiracy, Vic later referred Dorothy to Austin Edge and Lucille Williams, who in turn acquainted her with Mose, Driscoll, and Wingey. Similarly, Menendaz introduced her to Decker, who in turn referred her to Booker, who already knew of Dorothy as one of Edge's "good customers." Petitioner cannot escape responsibility for the acts of these defendants merely because what he may have conceived to be a limited conspiracy "turned out to be one of wider range of which the supposed smaller one, in fact, was but a segment," for it is enough that he had "connected himself with a criminal conspiracy, even though he was unaware of its full ex-

tent." *United States* v. *Manton*, 107 F. (2d) 834, 848, 849 (C. C. A. 2), certiorari denied, 309 U. S. 664; see also *Coates* v. *United States*, 59 F. (2d) 173, 174 (C. C. A. 9).

2. The trial court instructed the jury that (R. 189)—

> The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law-abiding citizen. Such evidence is permissible under the law, and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence.

Petitioner contends (Pet. 3–4, 13–15) that the foregoing instruction was inadequate under the decision of this Court in *Edgington* v. *United States*, 164 U. S. 361, as interpreted in *Sunderland* v. *United States*, 19 F. (2d) 202, 214–215 (C. C. A. 8), and *Salinger* v. *United States*, 23 F. (2d) 48, 52–53 (C. C. A. 8). He asserts that the instruction was too narrow and did not explain to the jury the purpose and function of character evidence.[6]

It is first to be noted that petitioner did not object to the charge as given, nor did he request that it be amplified. Cf. the *Edgington*, *Sunderland*, and *Salinger* cases. Therefore, his contention,

[6] Petitioner also claims (Pet. 15) that the instruction was bad because it ignored the testimony as to petitioner's reputation for truth and veracity. There is no requirement, however, that the trial court recapitulate all the items of evidence. *Allis* v. *United States*, 155 U. S. 117, 124.

raised for the first time on appeal, presents nothing for review, for, as was held in *Allen* v. *United States,* 4 F. (2d) 688, 694, *supra,* certiorari denied 301 U. S. 697:

> Errors in the instructions should be pointed out specifically before the jury retires, and the court should be given an opportunity of correcting its mistake or oversight. This rule is dictated by public policy, and prevents new trials and unnecessary expense.

*Allis* v. *United States,* 155 U. S. 117, 124; cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239.

Apart from petitioner's failure to object, we think that the instruction given was adequate. In the *Edgington* case, this Court condemned as erroneous an instruction to the effect that "evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt." The Court said, in effect, that the purpose and function of character evidence is to generate a reasonable doubt; that it is entitled to be considered, whether the other evidence be clear or doubtful; that when it is considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal; and that the circumstances may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing. However, by this discussion

the Court "was simply giving its opinion as to what effect evidence of good character might have, and not laying down the rule as to the charge to be given by the trial court." *Grace* v. *United States,* 4 F. (2d) 658, 662 (C. C. A. 5), certiorari denied 268 U. S. 702. See also *Nash* v. *United States,* 54 F. (2d) 1006, 1007 (C. C. A. 2); *Winter* v. *United States,* 13 F. (2d) 53, 59 (C. C. A. 8); *Allen* v. *United States, supra,* at p. 695; and *Le More* v. *United States,* 253 Fed. 887, 894 (C. C. A. 5), certiorari denied 248 U. S. 586.

The instruction given avoided the error condemned in the *Edgington* case, and conformed in substance to those approved in *Winter* v. *United States, supra,* at p. 58; *Linde* v. *United States,* 13 F. (2d) 59, 61–62 (C. C. A. 8); *Warren* v. *United States,* 250 Fed. 89, 92–93 (C. C. A. 9); *Searway* v. *United States,* 184 Fed. 716, 717 (C. C. A. 8); and *Humes* v. *United States,* 182 Fed. 485, 488–489 (C. C. A. 8).

The *Sunderland* and *Salinger* cases, which express the view that the discussion in the *Edgington* case undertakes to lay down a rule of law, misconstrue the purport of this Court's opinion. But, in any event, whatever basis there may be for requiring a more comprehensive instruction in mail fraud cases where the subjective issue of intent is critical, the charge given in the present case was entirely adequate since the only purpose of petitioner's reputation evidence

was to bolster the credibility of his flat denial that he was engaged in the narcotic traffic. As was stated in *Allen* v. *United States, supra,* at 695, character testimony "grows to large importance in one case, while in another it is inconsequential."

## CONCLUSION

The decision below is correct, and there is no real conflict of decisions nor any question of general importance. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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